IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 26, 2008

# STATE OF TENNESSEE v. DELMAR HUGH LAUGHLIN

**Direct Appeal from the Criminal Court for Sullivan County**
**No. 49994 R. Jerry Beck, Judge**

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**No. E2007-01988-CCA-R3-CD - Filed November 20, 2008**

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A Sullivan County jury found the Defendant, Delmar Hugh Laughlin, guilty of one count of voluntary manslaughter and one count of attempted second degree murder. On appeal, the Defendant claims the evidence does not sufficiently support his conviction of attempted second degree murder and the trial court erred when ordering him to serve consecutive sentences. Finding no error, we affirm the trial court's judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J.C. MCLIN, JJ., joined.

Stephen M. Wallace, Blountville, Tennessee, for the Appellant, Delmar Hugh Laughlin.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, District Attorney General; B. Todd Martin and Kaylin Render Hortenstine, Assistant District Attorneys General, for the Appellee, State of Tennessee.

## OPINION

### I. Facts

### A. Trial

At trial, the State presented the following evidence: Officer Jaime Carroll Free, a systems analyst with the Sullivan County Sheriff's Department, said that he was on patrol on June 27, 2004, when he was dispatched to respond to a disturbance. He arrived at the house just after 7 A.M. Officer Free described the scene at the Defendant's house where he saw "a man standing next to a gray pickup truck to the left of the residence." Motioning for Officer Free to approach him, the

Defendant "advised [Officer Free] that him and his son had been into an altercation." The Defendant also showed Officer Free some "spots" on his arms. The Defendant recounted that he argued with his son, Delmar Duane Laughlin,[1] over whether Mary Carla Clark, his son's girlfriend, could stay at the house. The Defendant gave Officer Free keys to go into the house. Officer Free stated that he entered the house and went into the bedroom, where he saw "a female crawling across the bed toward the door. And she stepped off the edge of the – the bottom edge of the bed and was standing at the doorway and asked if she could help [him]." The female was Clark, who had been asleep and denied knowing anything about an altercation. Officer Free asked Duane if he had argued with his father, and Duane denied having such an altercation. Officer Free said he asked Duane and Clark to leave the residence temporarily to allow the Defendant time to "calm down." Duane and Clark complied, and they walked away from the house. The Defendant then asked Officer Free and Officer Porter, another officer who was on the scene, to re-enter the house with him so he could show them his weapons. Officer Free unloaded the various guns the Defendant showed him. Officer Free also instructed the Defendant on how to dial 9-1-1. Officer Free recounted that the Defendant showed him an assault-type 12 gauge shotgun while saying "he could fire that weapon and reload it before [Officer Free] could shoot [his]." Officer Free left the house around 8 A.M., but the 9-1-1 dispatcher soon notified him that the Defendant had called and reported that his son had the house and truck key. Officer Free began to return to the house, but before he arrived at the house, the dispatcher notified him that the Defendant called a third time and reported shooting his son.

Officer Free testified: "When I got to the top of the edge of the driveway I could see [the Defendant] leaning over the top of Duane. They were in-between a little small pickup truck and the steps of the front porch." The Defendant kept repeating that he "shot [his] baby." The officer then saw Clark, who was bleeding and yelling for help while lying by another truck. Officer Free approached the Defendant and pulled a pistol out of the holster the Defendant wore. He also saw the 12 gauge shotgun in the back of a pickup truck, the .38 handgun on the chair on the front porch, and the .22 magnum in the Defendant's side holster. In addition, Officer Free found a yellow pocketknife in the Defendant's pocket. At this point, Duane was still conscious. He said that Clark was about twenty feet away from the porch.

On cross-examination, Officer Free said that Reserve Officer Daniel Owenby accompanied him to the Defendant's house. He described the Defendant as appearing afraid when the police initially arrived. The Defendant told the police that his son threatened him and that he wanted Clark out of his house. The Defendant then told the police exactly where his guns were stored, with two of them in the bedroom where Clark and Duane slept. The Defendant told Officer Free that Clark and Duane were doing drugs, and Officer Free saw prescription bottles around the house. After Officer Free unloaded the Defendant's guns, he took the ammunition with him.

Officer Free said that when he returned to the house after the second and third 9-1-1 calls, he saw Duane "laying on his left side" with his head near the front porch step on a pillow. After they

[1] For the sake of clarity, we will refer to the victim Delmar Duane Laughlin by the name Duane and the remaining members of the Laughlin family by their first names. We mean no disrespect.

disarmed the Defendant, the officers escorted him to the police cruiser. Officer Free saw a green switchblade knife next to Duane. Officer Free found the 12 gauge shotgun in the house, and he later put it in the back of the truck. Also, Officer Free saw the path through the field that Clark and Duane used to return to the house.

On redirect examination, Officer Free said he did not see Duane or Clark armed. He said the Defendant seemed satisfied with him merely asking Duane and Clark to leave the property. When Officer Free saw Duane at the house after the shooting, Duane was "laying on his left side [with] [h]is intestines . . . on the . . . ground."

On recross-examination, Officer Free said he did not know the exact time of the shooting. He described Duane as around six feet tall and weighing about two hundred pounds, making him larger than the Defendant.

Officer John Porter of the Sullivan County Sheriff's Department was the backup officer for Officer Free. Officer Porter testified that he took the Defendant into custody and held him while Officer Free confiscated the Defendant's weapons. Officer Porter then sat with the Defendant in the police cruiser until the Defendant was taken to jail. The Defendant told Officer Porter that he shot Clark because she threatened to "whip him" for calling the police on her. He said she moved towards him, and then Duane pulled out a knife and threatened to kill the Defendant. Officer Porter testified that the Defendant recounted that he asked his son to stop coming closer to him, but Duane refused to stop, so the Defendant shot him. Officer Porter said that later the Defendant told him that the gun went off because he fell back into a chair.

On cross-examination, Officer Porter said he was present at the house when Duane and Clark left the house and when Officer Free taught the Defendant how to dial 9-1-1. When Officer Porter returned to the house for the second time, he did not observe what transpired after the shooting because he was sitting with the Defendant in the police cruiser. Officer Porter testified that the Defendant said Duane had pulled a knife on him. Officer Porter clarified that he did not escort the Defendant to jail. On recross-examination, Officer Porter stated that he did not see a knife by Duane.

Detective Tommy Lynn Arnold with the Sullivan County Sheriff's Office testified that he responded to a 9-1-1 call to 1501 Fordtown Road on June 27, 2004. He said that when he arrived on the scene, he saw the Defendant sitting in a police cruiser. Detective Arnold recovered a handgun, a pistol, a revolver, and several shotguns at the scene along with empty shell casings and live ammunition. He also found three knives and two sheaths. He said the Defendant had just used the shotgun. After the Defendant consented to a search and waived his Miranda rights, Detective Arnold took the Defendant's statement, during which the Defendant admitted shooting twice at Clark and once at Duane. While walking around the property, Detective Arnold found spent casings by the steps coming off the porch and blood near the driver's side of a truck.

On cross-examination, Detective Arnold clarified that he was not one of the initial responders. He said that by the time he arrived, some guns and ammunition had been moved from

their original positions. He testified that the spent shells were within a few feet of each other. He also found Clark's purse in the bedroom, which contained her "personal identification and pills and medications."

On redirect, Detective Arnold said that there was no evidence the green knife belonged to Duane. On recross-examination, Detective Arnold explained that he did not know where the police originally found the knife. As a rebuttal witness for the State, Detective Arnold said Deputy Owenby told him that Duane was not armed.

Detective Billy Joe Richardson with the Sullivan County Sheriff's Department testified that he monitored conversations the Defendant had while in jail. He recorded the interview of the Defendant by Lieutenant Joey Strickler, which occurred a few days after the shooting. The Defendant initially said that Clark "put [a .38 shotgun] in his face that morning and said she'd blow his brains out," and called him an "S.O.B." Later, the Defendant said Clark rested the gun and ammunition on the bed. He also told police that Clark had a green-handled knife and some drugs in her purse. According to Detective Richardson, the Defendant said that he thought Duane and Clark left the house but that he later saw Duane's truck still at the house. When the Defendant went outside to feed the chickens, he saw Duane laying on the ground. The Defendant gave Duane a cigarette, but Duane dropped it. Then, the Defendant saw Duane was bleeding, so he put a pillow under Duane's head and "saw [Duane's] guts hanging out." On cross-examination, Detective Richardson said that the Defendant told him that "he couldn't read and write, but he wasn't no dummy."

Special Agent Teri Arney, a firearms expert with the Tennessee Bureau of Investigation, testified that the shotgun the Defendant used was working properly. Using the muzzle-to-garment test, Special Agent Arney concluded that the pattern found on Clark's t-shirt suggested that the gun was fired from a distance of ten to twenty-five feet from the victim. The pattern on Clark's leg suggested the same distance. On cross-examination, Special Agent Arney stated that the shots were fired from a 12 gauge pistol-grip shotgun, which operates by pump-action.

Mary Carla Clark testified that she lived with the Defendant and Duane. She said she contributed to the household expenses by working at Hardee's and redeeming food stamps. Clark admitted to serving 20 days in jail for driving without a license and evading arrest. Clark also acknowledged that although she was still married to Mickey Eugene Clark, Sr., she had been dating the Defendant for about a year. When explaining the various life insurance policies covering Duane and her, Clark said that she took out a policy on herself with Duane as the beneficiary, and Duane reciprocated. Clark filled out both applications.

Clark said that the Defendant threatened "a long time ago that he was going to try to kill [her]. But [she] didn't think it was ever going to happen." On June 27, 2004, Clark woke up to use the restroom, and while returning to bed, the Defendant told her that she "had five minutes to get out of the house." Subsequently, Clark told Duane she wanted to leave, and she packed her clothes, which Duane unpacked, and the two returned to bed. Clark said she next woke up when the police

arrived. She said she got dressed and left the house with Duane at the direction of the police; neither carried any weapons. The two then waited in the field, and Clark told Duane that he needed to find someone else to date. They returned to the house because they needed their pain medications, and as they approached the house, they saw the Defendant. The Defendant told Clark not to go in the house, so Duane approached the porch. Clark stated that as Duane neared the porch, the Defendant shot him. Clark said Duane was still unarmed. She yelled for Duane, but then the Defendant shot towards her. She was hit in the stomach and knee. Clark said the Defendant was "laughing the whole time he was shooting us." Clark was shot in the arm while crawling under a truck. She then made her way to a ditch and pretended to be dead.

On cross-examination, Clark admitted that she did not work very long at Hardee's or at her previous job at another local restaurant, but she did regularly earn $40 a week caring for chickens. Clark also admitted pleading guilty to theft for passing bad checks. Clark described Duane as not having been able to read very well but denied that he was "mentally limited." Clark said she can read and write, but she said she could not read "a whole lot of big words and stuff." Clark conceded that she unsuccessfully tried to collect on the life insurance policy that covered Duane.

When asked about her relationship with the Defendant, Clark said that he often provoked her, "[b]ut [she] would try to learn to ignore." Additionally, she said she became angry when he called her names, but she "never tried to hurt him." Clark stated, "I never threatened that man," referring to the Defendant. Clark argued with the Defendant on a Saturday night prior to the shooting. On June 27, 2004, the Defendant called her a "whore" and a "bitch[]." Clark denied provoking the Defendant. She also denied knowing there were guns next to her bed and said she had never fired a gun. Clark said that when the police told her to leave the house, they did not instruct her to call before returning. Clark and Duane left the house on foot and went down a path into the woods. She saw the police cars leave. When the Defendant went back inside the house, they returned to the house. Clark said that it "didn't bother [her]" that the Defendant forced her to leave the house because she could move in with her "mamaw." She said the Defendant came outside the house with a 12 gauge shotgun as they approached. Duane began moving towards the house to get her purse and clothes, and the Defendant "reached into the door and grabbed the gun," according to Clark. She said the Defendant then shot Duane "because [Duane] was trying to protect [her]." After Duane was shot he "got back up and got [the Defendant's] attention." Clark said she remained quiet so "[the Defendant] would think [she] was dead." Clark reiterated that Duane did not have a weapon.

Dr. George Testerman, the on-call surgeon who operated on Clark after the shooting, testified that "she had multiple shotgun wounds to her body"and "specifically she had several shotgun pellet wounds to her abdomen and to her chest and to her left arm." Dr. Testerman said that if the wounds were left untreated, Clark would have died due to the tears in her small and large intestines and stomach. He counted at least fifty holes in Clark's abdomen and left many of the pellets there.

Dr. Jeffery J. France, an orthopedic surgeon at Appalachian Orthopedics in Kingsport, Tennessee, testified that he treated Clark on June 27, 2004, for trauma injuries to her left knee and left arm. He said she had a shotgun wound to her left knee, which he treated and cleaned. He was

able to remove some of the shotgun pellets from that wound. Describing the injury to Clark's knee, he said, "She had shot, probably 100 pellets to her left knee." He classified Clark's arm injury as superficial.

Dr. William Frederick McCormick, the pathologist and forensic pathologist who performed Duane's autopsy, testified that he recovered pellets from Duane's abdomen and pelvis. He determined that Duane died from loss of blood and that "[d]eath was certainly not instantaneous." Dr. McCormick stated that the pellets traveled through Duane's body from his left side to his right side and downwards to his feet.

On cross-examination, Dr. McCormick stated that Duane seemed to be hit by two shots. He said the less damaging wound was likely caused by a bullet shot from a further distance away from Duane. Duane's body tested positive for marijuana and therapeutic levels of anti-psychotic medication.

Anthony Leslie Lorenzo Laughlin, one of the Defendant's children, testified that shortly before June 27, 2004, the Defendant came to the house Anthony shared with his mother. The Defendant was angry because he thought Anthony's wife had hung up on him while talking on the telephone. In reality, the Defendant had been speaking to the voicemail message. Anthony said that after they resolved that issue, the Defendant talked about Duane and Clark. The Defendant called Clark "either a bitch, whore, slut, or something." Anthony said the Defendant told him, "If Duane goes and gets her and brings her back to the house, I'll do away with him, too." Moreover, the Defendant threatened, "If [Duane] goes and gets that damn bitch, I'll shoot her; shoot him, too," referring to Clark. Anthony said the Defendant also said that he would "get by with murder and he was smarter than everybody else." Moreover, the Defendant said that the best way to "make somebody suffer is to gut-shoot them." Anthony added that the Defendant had been served with an eviction notice, and they began arguing about what the Defendant should do. During the argument, the Defendant threatened to beat Anthony, which escalated to him threatening to shoot Anthony. Anthony said he grabbed the gun from the Defendant. On redirect examination, Anthony said the Defendant was bruised and scratched after they wrestled for the gun.

Glenda Diane Travis, the Defendant's ex-wife, testified that she visited the Defendant while he was at the Indian Path Hospital getting treated for the bruises and scratches he suffered during the "scuffle[] over a gun." She said she knew that Duane regularly carried a yellow-handled knife with him. Around 7 A.M. on June 27, 2004, the Defendant called Travis and told her that "something had busted in his stomach and he couldn't call 9-1-1." Travis called 9-1-1 for him. Also, Travis testified that before the shooting and trial, the Defendant told her that Duane did not have a knife with him on June 27, 2004.

On cross-examination, Travis stated that Duane "couldn't read good" and could not write well, but she said that he could sign his name. Duane was not employed, rather, he received a disability check because "he was slow." When shown a signature of Duane's name on an insurance policy to which Clark was the beneficiary, Travis declared that the signature was not Duane's.

Moreover, she pointed out that the signature misspelled Duane's name, saying "Dalmer" instead of "Delmar." Travis said the signature actually looked like Clark's signature, but she conceded that she did not see Clark sign the document. Travis said that although Duane had been dating Clark for about six months, he may still have been married to another woman. As a rebuttal witness, she testified that Duane was right-handed.

Sabrina Laughlin testified that she was married to Anthony for about four years and was in the process of obtaining a divorce. She said the Defendant came to her and Anthony's house before June 27, 2004, and he talked about Clark being released from jail. Sabrina stated that the Defendant threatened, "If [Duane] brings that whore back to my house I'll shoot them both." On cross-examination, Sabrina said Clark and the Defendant often did not get along. On redirect examination, she said the Defendant often called Clark a "whore."

Franklin Ray Kiser, Jr., the Defendant's grandson, testified that he gave his grandfather a switchblade knife. On cross-examination, Kiser said that Clark would provoke the Defendant and that they would get angry with each other. Kiser recalled that Clark threatened the Defendant. On redirect examination, Kiser testified that the Defendant called Clark names like "[a] bitch and slut, stuff to that extent" and returned her threats with threats of his own.

The Defendant's witness Tommy Arnold, a Detective with the Sullivan County Sheriff's Office, testified that when he interviewed Clark on July 1, 2004, she told him that the Defendant shot her before he shot Duane. On cross-examination, Detective Arnold conceded that he spoke with Clark when she was in the hospital and recovering from surgery.

Daniel Franklin Owenby, a reserve deputy for Sullivan County, testified that he responded to the dispatch for police assistance on June 27, 2004, to the Defendant's house. After arriving at the house, he saw two wounded people. He testified that Clark was screaming, "Please help me[!]" while lying by a truck. Deputy Owenby saw Duane near the porch "wallering [sic] around" while "bleeding really bad." Deputy Owenby said he saw a switchblade knife in Duane's left hand.

After hearing the facts presented, the jury found the Defendant guilty of voluntary manslaughter and attempted second degree murder.

### B. Sentencing Hearing

At the sentencing hearing, the following evidence was presented: Kawania Elizabeth Pierson, one of the Defendant's children, testified that the Defendant had a "violent history," which included him pulling a gun on her and her mother. She also saw the Defendant put a knife to her mother's neck at some point in the year 1983.

Mary Carla Clark testified that she still had nightmares after the shooting. She said she was in constant pain and had to have several surgeries. She stated that she will also require medication for the rest of her life.

Anthony Leslie Lorenzo Laughlin testified that the Defendant beat Duane, their oldest brother, and him when their sister knocked over the Defendant's beer in the car. During that same incident, the Defendant threw the pizza they had just bought on the ground and made the boys eat it. Anthony recalled that this happened in the 1970s. Anthony also recounted an argument with the Defendant just before the shooting because the Defendant received an eviction notice. Anthony said the Defendant was "cussing and jumping up and down." The Defendant threatened to shoot him, but Anthony took the Defendant's gun from him.

Glenda Diane Travis testified that the Defendant is not welcome in her home. She said that one time, Defendant threatened to kill her while they visited her sister's grave. Another time, he threatened to kill her, cut up her body, and put the pieces in a creek. Travis said the Defendant beat her and threatened her life with guns and knives. She also said that she paid $7000 for Duane's funeral bill and was unable to work for a few months due to the effects of the shooting.

Charlton S. Stanley, a forensic psychologist, testified that he examined the Defendant. He determined that the Defendant was at high risk for a stroke. In addition, he said that the Defendant measured in the lowest one to five percent for various cognitive abilities. He also said the Defendant suffered from dementia and "[has] got a temper." Stanley described the Defendant's judgment as "significantly impaired."

After hearing the evidence and considering the applicable law, the trial court sentenced the Defendant to consecutive sentences of three years for the voluntary manslaughter conviction and eight years for the attempted second degree murder conviction. It is from this sentence that the Defendant now appeals.

## II. Analysis

On appeal, the Defendant challenges the sufficiency of the evidence for his attempted second degree murder conviction and claims the trial court erroneously sentenced him to serve consecutive sentences.

### A. Sufficiency of the Evidence

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The

jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

A conviction for attempted second degree murder combines the statutory elements for attempt and second degree murder. Criminal attempt is when a person "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." T.C.A. § 39-12-101 (2003). Second degree murder is defined as "[a] knowing killing of another." T.C.A. § 39-13-210 (2003). "Knowing" with respect to second degree murder is defined as a person acting with an awareness that his "conduct is reasonably certain to cause" the death of the victim. *State v. Page*, 81 S.W.3d 781, 787 (Tenn. Crim. App. 2002). "The result of the conduct is the only conduct element of the offense", and so "a knowing second degree murder is strictly a 'result-of-conduct' offense.'" *Id.*, (citing *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000)). Thus, "the 'nature of the conduct' that

causes death is inconsequential." *Id.* If a defendant acts intentionally, meaning that he acted with a conscious objective or desire to cause the death of the alleged victim, then the requirement of "knowingly" is met. T.C.A. § 39-11-301(a)(2) (2003); *Page*, 81 S.W.3d at 787-788.

In this case, the Defendant had repeatedly threatened to kill Clark, both in her presence and in the presence of third parties. On the morning of June 27, 2004, the Defendant shot Clark three times with a 12 gauge shotgun. In between each of these three shots, the Defendant had to manually pump the shotgun to ready it to shoot again. Clark hid under a truck, but he continued to shoot at her. She eventually lay in a ditch and pretended to be dead to deter him from shooting her again. The Defendant's shooting the loaded gun towards Clark after threatening to kill her shows that he had the intent to kill her and that he knew that his conduct was reasonably certain to cause her death. The acts of aiming and shooting the shotgun were substantial steps towards the commission of the offense. This evidence is sufficient to show that the Defendant acted with intent to cause the death of Clark. The Defendant is not entitled to relief on this issue.

**B. Sentencing**

The Defendant argues that the trial court erred when it sentenced him to serve consecutive sentences, and that the trial court's order of consecutive sentences violated his Sixth Amendment right to a jury finding him to be a dangerous offender. When a defendant challenges the length, range, or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's determinations regarding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the

offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

A trial court may order multiple sentences to run consecutively if it finds by a preponderance of the evidence that the "defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(b)(4) (2005). In addition, when a court is ordering consecutive sentences because it finds the defendant to be a dangerous offender, it must also find that the "extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences . . . reasonably relate to the severity of the offenses committed." *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

We begin by noting that the Defendant initially raised this issue at the hearing on the motion for a new trial, and while the trial court modified its sentence for the Defendant with respect to other issues, the trial court invoked its previous reasoning for ordering consecutive sentences. We conclude that the trial court did not err. In *State v. Allen*, the Tennessee Supreme Court held that "[a] trial court's determination to impose consecutive sentences on the basis that a defendant is a dangerous offender does not . . . raise the Sixth Amendment concerns addressed in *Jones*, *Apprendi*, and *Blakely*." 259 S.W.3d 671, 689 (Tenn. 2008) (citing *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004)).

In this case, the trial court found the Defendant was a dangerous offender. The court reasoned that the Defendant's actions made him a risk to public safety:

> His behavior indicates little or no regard to human life, and no hesitation about committing a crime in which the risk of human life is high. Now, given the jury found the Defendant guilty of a passionate killing as to the manslaughter case, certainly as to the shooting of Mrs. Clark, the survivor in this mess where the jury found attempt to commit murder in the second degree.
>
> Now, in this case the Defendant shot his son. It was a fatal shot. The son didn't die immediately. But then he began taking shots at the girlfriend, Carla Clark. She was hit in various places, knocked to the ground, began to try to crawl toward or under a truck parked nearby. Another shot was fired. Evidently it was a throw-up maybe from the ground as she was under the truck, was hit. She was hit in the back, the front, the knee, just repetitive shooting. That certainly indicates to the Court that TCA 40-35-1115 [sic] would be applicable, § (4).
>
> Also under *Wilkerson*, the Court's of the opinion that test has been satisfied that such a sentence is necessary to protect the public. Even in some of the State's proof from the psychologist indicated the Defendant had a – has a hot temper. . . .
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> You can look at it two ways. He's just liable to go off any time due to his

> mental background. And the victim-witness testimony, I think that would be applicable into his past performance. . . .
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> I believe one of the children testified that he had such a temper. And I don't mean just a [sic] instant temper. But somebody'd knocked a drink over in a car. He threw the pizza on the ground, made the children eat the pizza.
>
> I think he's a dangerous offender on all the proof I've heard at trial, all the proof I've heard here. And I think, under *Wilkerson*, it's necessary to protect the public.

The court continued, and it stated that it found that the sentence length corresponded to the Defendant's convictions: "Confinement is necessary for a period of time if necessary to protect society [sic]. And that the aggregate length of the sentence, if consecutive sentencing is ordered, is reasonably related to the offense for which the Defendant stands convicted."

At the resentencing hearing, the trial court invoked its previous determination that the Defendant needed to serve consecutive sentences: "In the original sentencing hearing the Court stated its reasons for running the sentences consecutive [sic] . . . The Court will not disturb that finding of consecutive sentencing. . . [F]or the reasons stated for consecutives [sic] at the original sentencing hearing, the Court adopts those now as part of this ruling here."

We conclude that the trial court properly found that the Defendant was a dangerous offender. First, the Defendant's history with violence, along with the psychologist's testimony discussing the Defendant's temper show that an extended sentence is necessary to protect the public against further criminal conduct by the Defendant. The Defendant has a history of violence against his family members, including using deadly weapons against them. The Defendant put a knife to his ex-wife's throat and threatened to kill her and chop her body into pieces. He made his children eat pizza off the ground when one of them knocked over his drink. The Defendant has now been convicted of repeatedly shooting his son and his son's girlfriend. The psychologist who examined the Defendant for sentencing purposes described the Defendant as "[having] a temper" along with "significantly impaired" judgment. The Defendant's history of violence evidences the need to confine the Defendant for an extended period of time to protect society. Second, the consecutive nature of the sentences reasonably related to the severity of the offenses. The Defendant used a pump-shotgun to kill his son and injure his son's girlfriend because he did not want the girlfriend living in his house. The Defendant was convicted of voluntary manslaughter and attempted second degree murder. These are very serious crimes, and they warrant consecutive sentencing. We agree with the trial court that the Defendant was a dangerous offender. Finally, we note that the trial court ordering the Defendant to serve consecutive sentences, based on its finding that he was a dangerous offender, is not a violation of the Sixth Amendment's right to a jury. *Allen*, 259 S.W.3d at 689. Thus, the trial court properly ordered the Defendant to serve consecutive sentences. The Defendant is not entitled to relief on this issue.

## III. Conclusion

We conclude that the Defendant's conviction of attempted second degree murder was supported by sufficient evidence and that the trial court properly ordered his sentences to be served consecutively. Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE